IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 554

LAWRENCE ROBINSON,

Appellant,

—VS.—

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES

APPELLANT'S OPENING BRIEF

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a person licensed by the state to prescribe and administer narcotics."

The opinion of the Appellate Department is unreported, in that it is a memorandum opinion, but it will be appended hereto.

Jurisdictional Grounds

The judgment of the Appellate Department was entered, as aforesaid, on the 31st day of March, 1961. Thereafter, because of the desirability of having federal constitutional issues decided by the highest courts of the states before resort is had to this Honorable Court, appellant filed his petition for Writ of Habeas Corpus or Prohibition, No. 7660, in the District Court of Appeal of the State of California, Second Appellate District, which said petition was denied without opinion on the second day of May, 1961. Thereafter, appellant sought a hearing in the Supreme Court of the State of California, and on the 31st day of May, 1961, the said Court denied appellant's petition.

Thereafter, Notice of Appeal to the Supreme Court of the United States was filed with the clerk of the said Appellate Department, on the 26th day of June, 1961, notice thereof having been served by mail upon Counsel for Appellee.

This appeal is taken pursuant to 28 U.S.C. 1257 (2), which is as follows:

1257. Final judgments or decrees rendered by the highest courts of the state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Provisions of Law Involved

In addition to Section 11,721 of the Health and Safety Code, above set forth, on which the conviction appealed from is based, reference will be made herein from the 14th amendment to the United States Constitution and to section 647 of the California Penal Code, as it appeared prior to September 15, 1961, and in its present form. The said amendment and statute will be set forth in full in the appendix hereto.

Questions Presented for Review and Summary of Argument

The following questions are presented by this appeal:

A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:

(1) The said statute punishes a status, not an act or omission.

(2) It punishes an involuntary status.

(3) It punishes a condition of mental and physical illness.

(4) It is vague, indefinite, and uncertain.

(5) Double jeopardy is inherent in a crime of status.

(6) The statute is an unwarranted and unconstitutional infringement of freedom of movement.

(7) It is ex post facto.

(8) It imposes cruel and unusual punishment.

indeed, the whole of the city) might be considered a high purse-snatching, or high crime area (R. p. 20, l. 30). Nothing was said to the arrestees about purse-snatching and the officers saw no activity on the part of anyone in the car which could actually appear to be snatching a purse from anybody (R. p. 20, ll. 23-24). Additionally, nothing was said to the arrestees about driving too slowly (R. p. 21, ll. 1-6).

Although this was the month of February, at about 9 o'clock at night (R. p. 21, ll. 16-17), the driver obligingly had on a shirt with sleeves rolled up. With the help of a flashlight (R. p. 22, ll. 20-27), the officer was able to see a single mark (l. 27) on the arm of the driver. The arresting officers immediately placed the driver, one Banks, under arrest and lined the two females and Appellant up against a building (R. p. 23, ll. 26-30). Prior to the time the officers ordered appellant out of the vehicle, they had not seen him in violation of any law, felony or misdemeanor (R. p. 24, ll. 29-32). Thereafter, as stated on redirect examination, the officers noticed that "his eyes were pinpointed and glassy" (R. p. 25, ll. 4-6). They asked him whether he used narcotics, and he obligingly answered in the affirmative (R. p. 24, ll. 10-18). The officer then ordered appellant to roll up his sleeves, whereupon they saw "scar tissue and discoloration on the inside of his right arm, and numerous fresh needle marks on the inside of his left arm and also a fresh scab" (R. p. 24, ll. 19-29). In the arrest report, read into the record by Counsel for Appellant, it appeared that the officers checked the suspect's arm prior to the alleged admission (R. p. 26, ll. 16-29).

At this point Counsel for Appellant objected to the introduction of incriminating evidence on the ground that there was no probable cause for the search. The Court overruled this objection.

The People thereupon called the investigating officer who testified that, in his opinion, the marks and scabs on the arms of Appellant indicated that "a narcotic w[illegible] injected into the vein" (R. p. 58, l. 25). Thereupon, over Appellant's objection, the witness was permitted to testify as to admissions purportedly made by Appellant that he had had his "last fix on Wednesday night." On cross-examination, the "expert" stated that at no time did he witness any withdrawal symptoms in Mr. Robinson (R. p. 62, ll. 13-16). As a matter of fact, he wasn't under the influence at the time of the interview by the expert, so that he saw no influence and no withdrawal (R. p. 62, l. 18). Furthermore, at no time was it shown even by admissions, at what place the narcotics were allegedly injected by appellant.

Appellant, on his behalf, personally testified and presented his mother and the young lady who was with him at the time of his arrest, all of them in substance denying appellant was an addict or had ever used narcotics, and denying that any admissions of such conduct had been made at any time. The marks on his body, which were generally in evidence and not only on his arms, were stated to be a holdover from his military service, apparently caused by overseas shots.

The Court thereupon instructed the jury, who in due course returned a verdict of guilty as charged. At the time set for sentencing, appellant, by his Counsel, made an oral motion for new trial specifying all grounds herein specified as questions for review. The Court denied dismissal or a new trial, whereupon appeal was taken to the Appellate Department of the Superior Court.

In the said appeal, the said grounds were again raised in appellant's Opening Brief, wherein it was clearly speci-

fied that both federal and state constitutional objections were taken. Upon the Appellate Department's affirmance of the conviction, in the briefs presented on Habeas Corpus to the District Court of Appeal and the California Supreme Court it was argued that Section 11,721 of the Health and Safety Code denies petitioner's right under state and federal constitutions, to due process and to equal protection of the laws, on the ground stated as point "A" of the questions here presented for review.

ARGUMENT

Introduction

On the 1st day of September of this year there passed into history the infamous vagrancy laws which have existed almost since California has been a state. On that date AB 874, passed by the last session of the California legislature and signed into law by the Governor, became effective. As reported in the California Press, the Governor, in signing the bill, said that "the vagrancy laws have been made both *more constitutional* and more likely to lead to conviction when the justifications exist." (Emphasis here and elsewhere added.)

One editorial writer continued:

"Under the new law a vagrant must do something which amounts to disorderly conduct, such as loitering in a public place and refusing to identify himself or tell the police why he is there, and police must have a logical reason for demanding identification.

"The new law lays the principle that men cannot be thrown in jail or run out of the county because the enforcement officers do not like their looks or dress. It under-

writes the principle that in America a man has to commit an actual crime before breaking the law. It hits pre-censorship.

"While it may be subject to abuse it will give the judge who honors the Bill of Rights a weapon to check local pushing around of anyone."

"This bill is a big step forward in modernizing California law," the Governor said. "Our vagrancy laws were, without doubt, the most often abused and at the same time the most difficult ones with which to obtain a conviction in court.

"Under the O'Connell bill," we are saying, "It is what a man does, not who or where he is that defines the crime."

The Governor said the new law "will make it possible for the police in California to make valid arrests to protect the public from vagrants who live on the fringes of our society."

"At the same time," he said, "the new law scrupulously respects constitutional rights."

There will now remain punishable as a condition or status, under California law, only the addiction to narcotics which is herein sought to be held unconstitutional. This Counsel had long argued that the vagrancy laws were unconstitutional in their criminalization of status or condition. Ironically, addiction was first criminalized as one aspect of the crime of vagrancy, being first enacted as subsection 12 of section 647 of the Penal Code as follows:

> "Every person who is a drug addict, provided that a drug addict within the meaning of this section is any person who habitually takes or otherwise uses narcotics, and such taking or using is such as to en-

> danger the public morals or health or safety or welfare, or who is so far addicted to the use of such narcotics as to have lost the power of self control with reference to his addiction . . . is a vagrant."

The 1939 amendment deleted subdivision 12. At the same time stats. 1939, c. 1079, p. 3003, added sections 11,720-11,722 to the Health and Safety Code, dealing with narcotic addicts. The substance of the omitted subdivisions was incorporated into the Health and Safety Code sections.

The remedy which we here seek would delete, at least, the addiction phase of section 11,721, without doing violence to the acts of use or being under the influence of a narcotic, as such, and would free the statute books of California of the last remaining vestige of the crime of vagrancy.

The italicized language quoted from the Governor indicates the questionable status of the crime of status, however long it may have remained on California's statute books throughout the history of the state. A law is either valid or invalid, not more or less constitutional.

In "Narcotic Addiction," Report to Attorney General Edmund G. Brown (1954) by the Citizens Advisory Committee to the Attorney General on Crime Prevention, it is stated:

> "Narcotic addiction is fundamentally a problem in mental hygiene. It is *primarily a psycho-biological illness,* and only secondarily, is it a legal or criminal problem. The legal, criminal problem arises as a result of existing laws and as a consequence of the fact that it is necessary for addicts to resort to crime in order to secure money for the drugs. The general philosophy therefore should be that the management

of narcotics ought to be oriented in the direction of *social rehabilitation and not that of punishment.* P. 31."

That the highest state court to which appeal lies of right has similar constitutional misgivings which should be settled and determined by our highest court is suggested by the memorandum opinion of the Appellate Department on appeal below:

> "We are not unmindful that the Supreme Court, in In re Newbern (1960), 53 C. 2d 786, held that Penal Code 647.11, which made it a misdemeanor to be a common drunkard, was so vague and uncertain that it was unconstitutional. This might cause the higher courts to review the crime of being a narcotic addict or any crime of status. Although at present no appeal lies from the appellate department of the Superior Court to the District Court of Appeal or the Supreme Court, yet habeas corpus lies to test the constitutionality of the section in question. We would welcome such a test."

Points and Authorities

A. Section 11,721 of the Health and Safety Code Denies Appellant's Right, Under the 14th Amendment of the United States Constitution, to Due Process and to Equal Protection of the Laws in That:

(1) *The Said Statute Punishes a Status, Not an Act or Omission.*

It is a time-honored proposition that the existence of a crime requires two essential elements. One is external, consisting in an act or omission prohibited by the criminal law and technically referred to as the body of the crime or corpus delicti. The other is internal, and is generally

referred to as criminal intent, guilty knowledge or intent, or mens rea. 14 Cal. Jur. 2d: Criminal Law, Sec. 3, p. 183, citing Penal Code, Sec. 20.

Recently the California Supreme Court has reaffirmed the efficacy of Section 20 of the Penal Code which provides that "in every crime or public offense there must exist a union, or joint operation of *act* and *intent*, or criminal negligence." Overruling a long line of precedents to the contrary, it was held in *People* v. *Vogel*, 46 C. 2d 798, 299 P. 2d 850 (1956) that wrongful intent is an essential element of crime (bigamy in the cited case) even though the state statute is silent on the matter. The statute presently before the court, in its punishment of addiction, criminalizes a status where neither act nor intent is present.

That Federal constitutional law is concerned with the substance and procedure of State law is now clear. See *Lambert* v. *California*, 355 U.S. 225; *Smith* v. *California*, 361 U.S. 147; *Thompson* v. *City of Louisville*, 362 U.S. 199; and *Griffin* v. *Illinois*, 351 U.S. 12.

Certain language of *Lambert* v. *California*, *supra*, as reported in 14 Am. Jur., Criminal Law, Sec. 22 (Pocket Supp.) would seem to be equally applicable to crimes of status:

> "While a vicious will is not always a necessity to constitute a crime and conduct alone without regard to the intent of the doer is often sufficient, there being a wide latitude on the part of the law makers to exclude in the declaring of an offense, elements of knowledge and diligence from their definition, this is not so where the offense consists in a mere failure to register, a conduct which is *wholly passive* and unlike the *commission of acts* or the *failure to act* under circumstances that should alert the doer to the consequences of his deed."

So too the case of *Lanzetta* v. *New Jersey*, 306 U.S. 451, while the court's concern is principally with the lack of clarity, impliedly lends support to our attack upon the criminalization of status:

> "A statute penalizing 'gangsters' and declaring that 'any persons engaged in an unlawful occupation known to be a member of any gang consisting of two or more persons, who has been convicted on at least three times of being disorderly person, or who has been convicted of any crime, is a gangster' is so vague and uncertain in its definition of the offense as to be repugnant to the due process clause of the Fourteenth Amendment."

In some jurisdictions the legislatures have sought to reach by statute a class of undesirable persons against whom it is most difficult to obtain direct evidence of guilt of crime by making ill repute a substantive offense. The validity of such statutes, however, has been frequently denied upon the ground that constitutional provisions have been violated. *Peo.* v. *Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223. Anno.: 92 A.L.R. 1228; L.R.A. 1917 F. 904.

A statute making subject to conviction as vagabonds all persons reputed to be habitual violators of the criminal laws of the state or United States or habitually to carry specified weapons or to act as associates, companions, or bodyguards of persons reputed to be habitual violators of the criminal laws operates to deprive such persons of their liberty without due process of law in violation of the Federal and State Constitutions. *Peo.* v. *Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223.

To punish a person for a condition or status is to incriminate him vaguely as "bad," "immoral," or "lewd." *Lanzetta* v. *New Jersey, supra.*

(2) *The Statute Punishes an Involuntary Status.*

It is elementary constitutional law that Due Process and Equal Protection clauses require reasonableness in legislation and proper classification. U. S. Constitution, 14th Amendment; California Constitution, Art. I, Sec. 13.

Police regulations must be reasonable and free of oppression. *Sing Lee, Ex Parte*, 96 C. 354, 31 P. 245.

A classification which rests on no reasonable basis and which bears no substantial relation to a legitimate purpose to be accomplished is purely arbitrary and patently discriminatory. *Loff* v. *Long Beach*, 153 C.A. 2d 174, 314 P. 2d 518.

There is most serious constitutional question as to whether status as such may be punished. Be that as it may, intrinsic in criminal law is the proposition that there must be some volitional act or conscious omission before a party may be properly charged with crime; thus crime, by definition, must include such volition. As we shall elaborate under the next subheading, we can conceive of no condition known to man which, in itself, is more compulsive, hence less voluntary, than the status of addiction to drugs, which section 11,721 purports to criminalize.

Whatever argument may be made in favor of punishing a status of a voluntary nature (as that of gangster and some classes of vagrants, perhaps), it is both inhumane and a violation of the constitutional requirement of reasonableness in classification to punish an involuntary status. This is not simply a matter of legislative discretion or policy, but a question of limitations upon legislative acts. This principle is stated in Corpus Juris Secundum, Criminal Law, Sec. 13: "The legislatures of the several states have the inherent power to prohibit and punish any act as a crime, *provided they do not violate the re-*

strictions of the state and federal constitutions." Legislative power is properly limited by constitutional provisions as interpreted by the courts.

(3) *It Punishes a Condition of Mental and Physical Illness.*

There are at least three possible approaches by government to the admitted problem of addiction: (1) to let it alone or ignore it; (2) to treat it; or (3) to punish it.

The first suggested approach was taken in this country, generally, until the Harrison Narcotic Act, 1914. Prior to that date, government largely left the addict to the physician, who, we suggest, is better able to cope with him than is the policeman and jailer. This fact is stated in "Narcotic Addiction," a Report to Attorney General Edmund G. Brown (1954) by the Citizens Advisory Committee to the Attorney General on Crime Prevention, as follows (p. 14):

> "It is estimated that there were 400,000 Opium users in the United States in 1882 and these consumed 5,000,000,000 grains annually. Morphine was frequently and legally dispensed at retail counters. It was further estimated that by 1909 the imports of Opium reached 628,177 pounds annually as contrasted with a medical need of not more than 50,000 pounds. Our current legal import of Opium to the United States averages 350,000 pounds annually for a population of over 155,000,000 persons.
>
> "By 1914 the situation came to a head when the Harrison Narcotic Act was passed and in looking at the national situation in retrospect, we might say that the addiction problem had become so serious that the Harrison Narcotic Act was passed, but actually that was not the fact. The act was *not aimed at controlling*

> *addiction—basically it was a revenue act.* Indirectly, however, the act brought narcotics under control in 1914 at a time when it was estimated that there were from 150,000 to 200,000 addicted persons in the United States."

It is notable that, even to this day, the federal laws, while providing up to 20 years for dealing in narcotics, does not punish the addiction of the victim of the traffic.

Counsel has made the most extensive research of this problem, and ventures to say that nowhere else in the world is addiction punished as such (except in a small minority of American States). At one time in Russia, the use of tobacco (another narcotic) was punishable with death. This was soon abandoned as unrealistic, unenforceable, and inhuman. The renowned German physician hereinbelow quoted, had to argue, almost apologetically, for even forced treatment of the condition as an illness detrimental to the welfare of the group.

For the immediately following portion of this brief, we rely upon "Laws Controlling Illicit Narcotics Traffic," 84th Congress, 2d Session (1956), Document No. 120, presented by Senator Price Daniel (this was the report which led to legislation greatly increasing the punishment of narcotics *dealers*):

In eight states (Indiana, New Hampshire, New Jersey, Ohio, South Carolina, South Dakota, Utah, and West Virginia) there is no statutory provisions governing the commitment or treatment (medically or criminally) of drug addicts.

Only a small minority of states *punish* addiction (California, Connecticut, Kentucky, Louisiana, Michigan, New Jersey, Texas, Utah, Washington, and Wisconsin), and

all but four of these provide for treatment as well as punishment.

The vast majority of the states provide only for treatment of the addict, while punishing the pusher or dealer. The Uniform Narcotic Drug Act, as approved and adopted (1932) by the National Conference of Commissioners on Uniform State Laws, nowhere defines addiction as a crime, nor punishes it as such. (Summary of State and D.C. Legislation Relating to the Treatment of Drug Addiction—Part V of the Daniel Report—based on a study prepared by Samuel H. Still, American Law Division of the Library of Congress, for the Council of State Governments in 1953.)

To be a narcotics addict is not a criminal offense under Federal law, which merely defines the term in order to provide for the commitment of addicts to Federal *hospitals for treatment on a voluntary basis,* or prescribes confinement of certain addicts convicted of other Federal violations. Emphasis is now being given to the need for uniform compulsory *treatment* legislation. *Id.,* p. 45.

The treatment approach, which we urge is the only reasonable governmental conduct toward the addict, is well summarized in the report of the Attorney General (New York), Legislative Document 1952, no. 27:

> "The problem cannot be solved simply by the enactment of more stringent legislation aimed at preventing illegal traffic in narcotics. . . . When analyzed, it will be seen that the regulatory and corrective phases are patently interrelated. In the peculiar nature of the problem a step taken toward cure of the user, and removal of the hopeless addict, is a move toward curbing the use of narcotics. Not only is the user or addict removed as a source of business for the peddler, but,

> of even greater importance, he will cease to exist as a spreader of the disease . . . recommendations are . . . First, the steps designed to cut away the cancerous traffic. Secondly, the means of treatment and rehabilitation aimed at curing or removing the drug user, both for his own good and as a potential menace. Finally, the education of our citizenry. . . .
>
> "The proceedings must not be made criminal in nature and the commitment, for want of a better term, does not assume the character of punishment for an illegal act. The aftercare, although in the nature of parole, must similarly be mandatory, even though in no sense criminal."

In addition to the requirement that legislation must be reasonable, it must also be "reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380.

The court may take judicial notice that the criminalization of addiction has in no way tended to decrease the narcotics traffic, the only purported basis for government interference in this connection. On the contrary, while cruelly punishing and increasing the suffering of the addict, it has actually tended to increase narcotics addiction. This fact is recognized in "Narcotic Addiction," *supra*, at p. 36:

> The consensus of experts heard was almost unanimous that *the punitive approach to the narcotic problem has been a failure.* Case histories studied, together with the recidivist records of convicted addicts who have served sentences for addiction, show that very few remain free of addiction for any appreciable period of time following release from incarceration. . . . Insofar as the basic problem of addiction is concerned, it would appear that stiffer penalties

result in brushing the problem "under the carpet"; the problem remains in spite of our complacency in wearing "blinders."

That narcotics addiction is a status of mental and physical illness is a matter of universal definition:

> "In addition to habituation, the narcotics also produce addiction—an *uncontrollable* desire for always repeated doses of that particular substance, which simply cannot be curbed by reasoning. This symptom is hard to explain. Theories have been advanced of a 'hunger of the tissues for the poison'; the influence of a physiological vital function has been suspected, the existence of a certain poison level, *without which these functions can no longer take place* . . . we see a vicious circle, which can give us a good idea of the tremendous inner restlessness which compels the morphine addict to take the alkaloid again and again. Thus we can understand the menacing symptoms which appear when an addict is suddenly deprived of morphine. The consequences, delirium, fits of frenzy and collapse, give ample proof of the over-stimulation of a body accustomed to morphine, which eventually becomes unable to conserve a certain psychological and physical equilibrium without the aid of the opiate." Hesse, *Op. Cit.*, p. 14.

That the requirement of reasonableness prevents the legislature from delving, at all, into some circumstances and conditions of man is suggested by the following extract from 12 Am. Jur., Constitutional Law, Sec. 483, p. 160, n. 20:

> "Apart from the question of the exactness or inexactness of classification attempted by the legislature is the important fundamental problem as to whether the

> legislature had authority to deal with the subject at which the legislation was aimed. This qualification is of utmost importance and must be kept in mind in any case. If the legislature has no authority to deal with the subject at which measures are aimed, a classification, however logical, appropriate, or scientific, will not be sustained."

In a word, the legislature, like other departments, has its powers limited and circumscribed; therefore, though an intent to contravene the constitution will not be imputed, still, whenever the constitutional limitations are actually violated, to that extent the act of the legislature is void. 11 Cal. Jur., 2d Constitutional Law, Sec. 75, p. 410, n. 6, citing *Pepper* v. *Broderick*, 123 C. 456, 56 P. 53; *Forestier* v. *Johnson*, 164 C. 24, 127 P. 156.

Even in those areas of law in which the legislature may express its power, it is clear that there must be a "substantial relationship between the statute's end and means." *Cities Service Gas Co.* v. *Peerless Oil*, 340 U.S. 179, 186.

It is our position that the combinative effect of the above cited constitutional principles, while not preventing legislative action with respect to narcotic addicts, does prevent criminal treatment of them. The question is, simply: May the legislature punish as a crime a mental and physical illness? That such is the proper definition of addiction the court may take judicial notice from unanimous medical and scientific treatment of the subject. To assist in such judicial notice, may we present the following excerpts from *Narcotics and Drug Addiction* (1946) by Erich Hesse, M.D., noted German physician:

> "The facts show that the morphine molecule possesses a combination of paralyzing and stimulating properties; the latter manifest themselves in morphine

addicts, whenever their bodies do not receive a fresh dose of alkaloid, the only thing able to counteract and soothe the permanent excitation of their nervous systems which is the direct consequence of their continual indulgence in morphine. These symptoms, called 'abstinence phenomena,' are a direct *threat to the life of an addict,* for they indicate the imminent danger of a collapse of the circulatory system. They must be *avoided at all costs.*" *Id.,* pp. 39, 40.

Thus the condition of addiction not only is one of illness, involuntary, but the compulsive use of narcotics becomes the only way to prevent serious physical illness and suffering, collapse, even death:

"But such voluntary escape from the clutches of the poison is *no longer possible* once a real addict has developed. In this stage the alkaloid is the only thing capable of keeping the morphonist in a bearable physical and mental condition. If the morphine level in the blood and in the tissues sinks, the abstinence phenomena will set in. The addict becomes irritable, moody, depressed, and once again he will reach for the syringe in order to escape from this unpleasant state. . . . His mind is dominated by only one thought, the desire for morphine, the yearning for the toxin which alone is capable of *making his life bearable.* His will power is limited and the autistic attitude of the addict projects in the direction of the alkaloid exclusively." *Op. Cit.,* pp. 43, 44. (Emphasis here and elsewhere added.)

"The cells no longer cease their physiological functions under the influence of high concentration of morphine; in fact the presence of sufficient quantities of morphine *become an absolute necessity for them.*

> When the organism is deprived of the alkaloid, it immediately reacts by producing abstinence symptoms. State of exaltation, manic fits, cramps and serious circulatory disturbances *endanger the life of the addict.*" *Id.*, p. 45.

The criminal punishment of addiction is further unreasonable in that it penalizes a condition or status which would, in many instances, negative guilt of substantive crimes under the principle that "where insanity or unconsciousness is produced by intoxication, and where a specific mental state is an element of the crime charged," the party is incapable of committing a crime. *Peo.* v. *Baker*, 42 C. 2d 550, 268 P. 2d 705. Section 11,721 punishes the "insanity or unconsciousness" or semi-unconsciousness, as such.

That addiction is in fact insanity and that certain other criminal acts may be compulsively or irresponsibly caused by the said insanity is suggested by Hesse:

> "There begins the transition to the marantic stage. A decrease of intelligence, periods of moodiness, delusions, lack of self-confidence, negligence of duties, moral aberration, and finally acute *mental derangement*, in the form of acute psychoses, may set in. . . . The human wrecks not infrequently put an end to their lives with their own hands." *Op. Cit.* pp. 43, 44.

In this situation, the legislature can, even must, act; but the constitutional requirements of Due Process and Equal Protection require reasonable action. Such action must be medical or psychiatric, not punitive.

To penalize the condition of addiction as such is about as advanced as the burning at the stake of "witches" (insane persons) during colonial days. Many social prob-

lems may not be solved by penal sanctions, in the nature of things. The type of "treatment" administered by police departments and jailers can only aggravate the mental and physical aberration known as addiction—hence, this approach is unreasonable, in the light of modern medical knowledge, of which the courts may, even must, take notice.

The type of action which the legislature may take in this situation has in fact been taken in the Communicable Disease Prevention and Control sections of the Health and Safety Code (Secs. 3001, et ff.). Therein, notably in the case of venereal disease, compulsory medical treatment is provided for, with criminal sanctions only being applied for a wilful failure to cooperate in the prevention and control of the malady.

The German laws have already taken the approach suggested here, even under the "police state" of the Hitler regime. The pertinent sections of the German Civil Code provide that legal insanity includes the degeneration of character of the morphine addict (the very thing that Sec. 11721 penalizes as a status). Hesse, p. 49. Apparently, even under that rigid regime, however, addiction had not been taken cognizance of either as a criminal or a health measure. We incorporate the author's suggestion of the proper legislative approach:

> "In order to extirpate the evil of morphinism, it has been repeatedly recommended that addicts be subjected to compulsory dehabituation treatments. (NOTE: No penal sanctions *ab initio*. The author feels that even compulsory health treatment must be argued for:) The justification of this hinges on the question: Has a man the right to destroy his own body by poisons? No member of the national community has this right. . . . This principle justifies compulsory dehabituation treatments, to last until the care of the

morphonist is guaranteed. It is another question whether he should be kept in an institution for an indefinite time after his complete recovery, too." *Id.*, p. 47.

We suggest that our constitutional provisions prevent treatment of sickness as a crime, and that the striking down of such a statute by the courts will result in the passage of legislation along the lines hereinabove suggested, which would be reasonable and constitutional, additionally to the fact that it might lead to some real control of the rising problem of narcotics, which has gotten out of hand during our misguided period of attempted penalization of private moral conduct.

(4) *It Is Vague, Indefinite and Uncertain.*

It is elementary that clarity in language is required by the Due Process Clause of the Federal and State constitutions. We submit that lack of such clarity occurs in the instant legislation, in that it is not clearly set forth what is meant by the three crucial terms, "use," "be addicted to," or "be under the influence of." Thus, Webster's New International Dictionary gives several meanings to "use", one of which means to use upon a single occasion, whereas another equally standard meaning means to use habitually or customarily. Arguably, the legislature may have only intended to incriminate the *customary* use (as distinguished from the *compulsory* use suggested by "addicted"). This, however, does not clearly appear; so that it would be equally arguable that the legislature intended to prohibit a single use. The courts have, to be sure, read in the word "single," but this we submit is judicial legislation. Because of such lack of clarity, we urge that the ordinance does not pass the constitutional test.

By the same token, one would necessarily wonder from the wording of the statute what degree of influence the legislature had in mind, since a very small amount of a narcotic will affect only certain parts of the anatomy, in a very negligible manner, whereas larger amounts will cause the loss of self-control and even death.

Finally and importantly, under this head, there is such uncertainty as to the meaning of addict that we submit that the instruction given on this subject on the trial below, which will be discussed *infra,* is contrary to the medically accepted definition which it was obviously the intent of the legislature to import into the statute.

We submit that the definition of addict or addiction, derived from the case of *Peo.* v. *Thompson,* 301 P. 2d 313, 314, 315, 144 C.A. 2d Supp. 845 is erroneous, and that the court in the *Thompson* appeal did not mean to define addiction for the purpose of jury instructions. The instruction given by the court is inconsistent with definitions by the legislature throughout the codes which show addiction to mean not merely a frequent or habitual use, but a compulsive use over which the individual has no control.

For a definition of addiction we say turn, logically, to the medical profession:

> "Drug addiction may be defined as a state in which a person has *lost the power of self-control* with reference to a drug, and abuses the drug to such an extent that the person or society is harmed. It should be noted that addiction implies a *compulsive* and repetitious use of the drug, and that the harm done the user varies with the degree of personality disorder which characterizes the addict. In addition, one

> or more of the following related but distinct phenomena are always present: 1. Tolerance. 2. Physical dependence with resulting abstinence illness when the drug is withheld. 3. Habituation or emotional dependence." *Narcotics and Narcotic Addiction,* by David W. Maurer, Ph.D. and Victor N. Vogel, M.D. (1954), p. 27.

Addict (as noun): "A person who has acquired the habit of using spirituous liquors or narcotics to such an extent as to deprive him of reasonable self-control." 1 C.J.S., p. 1453, citing *Interdiction of Gasquet,* 85 So. 844, 147 La. 722.

Words and Phrases: "Under statute authorizing suspension of license of physician who is addicted to use of narcotic drugs, addicted is not a word of art and means excessive or intemperate use of, and license of physician who daily *required* inordinate supplies of narcotic drugs was properly suspended though there was not direct proof of deterioration." *Palmer* v. *Spaulding,* 87 N.E. 2d 301, 302, 299 N.Y. 368.

The legislature in constituting drug addiction of physician as ground for forfeiture or suspension of his license to practice medicine had in mind *pernicious consequences* accompanying abuse of narcotic drugs and employed statutory phrase "addicted to the use" in such sense. *Application of Palmer,* 87 N.Y.S. 2d 655, 658, 275 App. Div. 5.

The California legislature has clearly indicated its definition of "drug addict," or "narcotic drug addict," in Section 5250 of the Welfare and Institution Code: "Any person who, to the extent of having lost the power of self-control, habitually takes or otherwise uses opium, morphine,

cocaine, or any other narcotic drug as defined in the Health and Safety Code." We submit that somewhat less was required by the instructions given in the instant case than that a person should have lost the power of self-control to drugs involved.

Thus, it may be seen that reasonable minds differ as to the meaning of "addict."

Due Process of law in legislation also requires definiteness, or certainty; a vague or uncertain statute does not meet the requirements of due process. Hence, if an act of the legislature is so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and as to its application, it denies due process of law. 16A, C.J.S., Constitutional Law, Sec. 569(5), p. 584, nn. 28, 29, citing *Wolfe* v. *U.S.*, 149 P. 2d 391; *Cline* v. *Frink Dairy Co.*, 47 S. Ct. 681, 274 U.S. 445, 71 L. Ed. 1146; *Ward* v. *Auctioneer's Ass'n of Southern Cal.*, 153 P. 2d 765, 67 C.A. 2d 183, *cert. den.*, 325 U.S. 874, 89 L. Ed. 1992, 65 S. Ct. 1555; *Conally* v. *General Construction Co.*, 46 S. Ct. 126, 269 U.S. 385, 70 L. Ed. 322.

(5) *Double Jeopardy Is Inherent in a Crime of Status.*

Section 13 of Article I of the California Constitution is a mandate against double jeopardy.

In an article entitled Criminal Law and Administration, in the 1960 Annual Survey of American Law, *New York University Law Review*, Professor Gerhard O. W. Mueller states, on the subject of Double Jeopardy:

> "Likewise unsatisfactory in this field is the continued attribution of distinct sovereignty to municipalities so as to permit double prosecution by state and municipality. California deserves commendation for

> re-evaluating its state pre-emption policy, with the result that the clearly duplicitous Los Angeles felon registration ordinance was held unconstitutional, thus eliminating one cause of double jeopardy prosecutions. Indeed, there is no cause to believe that the many city ordinances, parroting state law, will increase the deterrent effect of state law. They are nothing but double jeopardy traps."

So also is a crime of status a "double jeopardy trap." Here, although we are faced with a single State Law, each municipality or locality is given power to punish the addict for his single, continuing status, even though his presence in a given area may have no connection with his use of the drug, and may be for the purpose of obtaining employment or medical care, or similar worthwhile purpose. When we consider the ruling that, once established, the status is *presumed* to continue, it may be seen that an addict may be a thousand times punished for his single condition.

(6) *The Statute Is an Unwarranted and Unconstitutional Infringement on Freedom of Movement.*

By the same token, the freedom of movement inherent in the American democracy is denied to citizens for the reason that they are mentally and physically ill. This is done by the statute's punishment of mere appearance in the County, City, or State of a narcotic addict, without evidence of his committing any forbidden act, even the injection of narcotics, while in the state.

The right to move freely within the United States is an incident of national citizenship protected against interference by the privileges and immunities clause of the Fourteenth Amendment. *Edwards* v. *California*, 314 U.S. 160, 178-186. Even before the Fourteenth Amendment was

enacted, this right of locomotion throughout the nation was held to be a right of national citizenship. *Crandall* v. *Nevada*, 6 Wall. 35. "It is plain," said Mr. Justice Douglas, "that the right of free ingress and egress rises to a higher constitutional dignity than that afforded by state citizenship." *Edwards* v. *California, supra,* at p. 181 (concurring opinion).

Undoubtedly the right of locomotion, the right to move from place to place according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution. *Williams* v. *Fears*, 179 U.S. 270, 274.

Justice Douglas noted in *Edwards* that State interference with freedom of movement which would prevent a citizen, because he was seeking new horizons would deprive him of that freedom of opportunity which is ours by virtue of the guarantee of liberty in the Fourteenth Amendment. May we properly deprive the addict who may enter our state or a subdivision thereof on business, or perhaps for medical treatment, of the said freedom of movement by a criminal prosecution for his condition?

(7) *It Is Ex Post Facto.*

Section 11,721 punishes the status of addiction whether or not acquired before passage of the said statute and whether or not it was innocently or medically acquired, as, for example, during application of narcotics to a soldier suffering from malaria or other tropic disease contracted as a casualty in the service of his country. In view of the fact that the sale and use of narcotics has been made illegal in the lifetime of perhaps most people living, cer-

tainly of many, and especially in view of the very recent criminalization of the status of addiction as such, many people who acquired this incurable habit before such legislation have by it been made automatic criminals upon migration to this state.

An *ex post facto* law is one which makes criminal and punishes an act (or status?) which was done before the passage of the law and which was innocent when done. *Peo.* v. *Edenburg,* 263 P. 897, 88 C.A. 558.

Section 10 of Article I of the United States Constitution prohibits the enactment of such laws by the States.

(8) *It Imposes Cruel and Unusual Punishment.*

The Eighth Amendment to the federal Constitution and Art. I, Sec. 6 of the California Constitution both prohibit cruel and unusual punishment.

A penalty is cruel when it shocks the moral sense and outrages those innate principles of humanity which have been broadened and expanded by civilized enlightenment. *Finley, In re,* 1 C.A. 198, 81 P. 104; *United States* v. *Rosenberg,* 195 F. 2d 583.

While it is normally for the legislature to define crimes and fix punishment that may be inflicted, courts may denounce the punishment as unusual if it is "out of all proportion to the offense, and is beyond question an extraordinary penalty for a crime of ordinary gravity committed under ordinary circumstances." *Finley, In re, supra.*

The Due Process clause of the Fourteenth Amendment prohibits a state from executing sentence in a cruel manner. *Louisiana, ex rel. Francis* v. *Resweber,* 329 U.S. 459, 91 L. Ed. 422, 67 S. Ct. 374.

The term cruel and unusual punishments "when it first found place in the federal Bill of Rights, meant not a fine or imprisonment or both, but such punishment as that inflicted by the whipping-post, the pillory, burning at the stake, breaking on the wheel, and the like; or quartering the culprit, cutting off his nose, ears or limbs, or strangling him to death. It was such severe, cruel and unusual punishments as disgraced the civilization of former ages and made one shudder with horror to read them." *O'Shea, In re,* 11 C.A. 568, 105 P. 776.

In view of modern medical knowledge of the nature of addiction, we submit that the punishment thereof, at all, and especially the application of the violent, unmedicated withdrawal, is a modern example of the burning of witches at the stake, the criminal prosecution of illness, and as such is inherently a case of cruel, unusual, inhumane, and unnatural punishment.

The criminal treatment of addiction, as legislated and as applied in California, imposes upon appellant (or others similarly situated) intense mental and physical torment and suffering, via "cold turkey" withdrawal method. This approach, often leading to collapse or death, offends the sense of justice inherent in the concept of Due Process. Whether we treat these unfortunate victims of our collective failure to take the profit out of narcotics dealing and to educate the populace at an early enough age as to the nature of addiction and the harms inherent in the use of drugs, as criminals or as the sick people they are, a minimum constitutional requirement would seem to incorporate the suggestions of Hesse, *supra*: "As regards the treatment of morphonists, the dehabituation treatment is the only way of curing the addict. . . . The dehabituation can be done abruptly or gradually . . . suppressing any

abstinence symptoms by a continuous-sleep treatment. Hospitalization is recommended."

Maurer and Vogel (p. 75, *Op. Cit.*) concur:

> "Complete recovery requires from three to six months, with rehabilitation and, if needed, psychiatric treatment. The withdrawal syndrome is self-limiting and most addicts will *survive* it with no medical assistance whatever (this is known as kicking the habit 'cold turkey'). Abrupt withdrawal is *inhuman,* but with the development of such drugs as methadone, it is possible to reduce the distress of withdrawal very considerably.
>
> "In no event is the illness to be taken lightly, and allowing addicts to go through it unassisted in jails or prisons is not only unnecessarily brutal, but may endanger the life of the individual; certainly some assistance is desirable if the individual is to have any hope of staying off drugs once he is withdrawn. . . . The fear of withdrawal distress is undoubtedly one of the very strong factors in sustaining addiction and eventually apparently supersedes the desire for pleasure which the addict originally felt on taking opiates."

Due process of law precludes defining, and thereby confining the standards required of states in their criminal prosecutions more precisely than to say that prosecutions cannot be brought about by methods that offend a "sense of justice." *Rochin* v. *California,* 342 U.S. 165, 92 L. Ed. 183, 72 S. Ct. 205, 25 A.L.R. 2d 1396; *Foster* v. *Illinois,* 332 U.S. 134, 21 L. Ed. 1955, 67 S. Ct. 1716.

B. Procedural Due Process of Law Was Denied by the Introduction of Evidence Obtained Through Unreasonable Search and Seizure and Self-Incrimination, Materially Affecting the Rights of Defendant, Under the 14th Amendment.

Much of the fine language, in our basic governmental documents, regarding respect for the rights of the individual, those things which are said to be the essence of democracy, are rendered nugatory in practice because the executive branch of government, through its police officers, who number in the thousands throughout the country, has apparently taken the attitude that constitutional rights apply only to the other two branches of government, the legislative and the judicial. In this momentous period of history, in which two world systems are competing for the loyalty of their own citizens and for the support of nations beyond their borders, it is well for America to take an adult and honest view of its failures as well as of its successes. We may not successfully hide our own recognition of the defects in our system by propaganda or otherwise, and even less may we expect to win friends and influence people abroad by an ostrich-in-the-sand approach to the negative aspects of our socio-economic-political system.

One of the areas in which America is failing is in its approach to crime and vice. This failure is due to at least two causes:

(1) As we have attempted to do in our economy, we have simply let nature take its course, with the result that we have both chronic unemployment and chronic crime and vice. Without getting into an economic argument, may we advance at this time the thought that the solution of crime and vice will require an affirmative action of a more

scientific and fundamental sort than the not time-honored but time-outmoded concept of "throw the culprits in jail!" In an enlightened age such as that which we tell ourselves we live in, we submit that some of our scientific knowledge should be applied to the eradication of the causes for crime and vice. Very little of that has been or is being done.

(2) We have over-legislated in connection with acts which we choose to call criminal, the most glaring examples which come immediately to mind being the criminalization of the status of homosexuality and of narcotics addiction. In these areas, our approach is as unscientific and benighted as was the burning of witches at Salem in an era of ignorance of the real cause of mental disease. We are relatively ignorant of the cause and cure of the mental or physical defects of homosexuality and of narcotics addiction, so that we now burn these two classes at the stake by applying to them the peculiar processes of local police action. This Counsel submits that penalization of such conditions, and many others which would be best removed entirely from the criminal field, can only serve to aggravate the problem, and thereby individual and social confusion resulting therefrom.

Against the background of this thinking, assuming it to be valid, to remove the constitutional protections against unlawful search and seizure, by legislative or judicial action, can serve no valid social function, since the end result will not be to correct evils which can only be corrected by other than police action in the first place. Although most of our thought and attention, in this area, is directed to the pros and cons of legislative attempts to override the constitutional decisions of *Cahan* and *Priestley*, just as surely may the courts, in individual cases,

override the salutary principles of these cases by simply closing their eyes to the facts.

In the instant case, we re-submit no probable cause for stopping of the vehicle containing the defendant and three others was shown by the prosecution. Since it was admitted that there was no warrant of arrest or search, and since it is well established that upon the absence of such it becomes the burden of the People to affirmatively show probable cause other than by judicial predetermination through the issuance of a warrant, the mere statement that the arrest was made for a traffic violation would seem hardly sufficient.

Much illumination is thrown on the reasons for the arrest of the defendant by the admission, on cross-examination, of the arresting officer of page 23 of the Record, lines 4 through 7:

> "Q. Now, your reason for stopping him was, eventually, the lack of rear view illumination; is that right? A. And the fact that he was driving slowly on a dark, unlit street, yes."

It is apparent, on the face of the case, that, whatever the facts may have been as to the absence of rear license plate illumination, this was only a pretext for the actual arrest of the parties in the car, which included the defendant, and three others. It is simply unreasonable to believe that the initial stopping of the vehicle and its occupants was for the said purpose. First of all, the arresting officers were not traffic officers and were not in a traffic car and not dressed in uniform. We have a provision in the vehicle code which was intended to govern traffic arrests which says that every traffic officer shall wear full distinctive uniform and be in a car distinctly marked. Sec. 40800, Vehicle Code.

It was not stated that a traffic citation was in fact issued, or that the officers even had a traffic book upon which such citations could be written. The only possible conclusion, therefor, would be that this was either an afterthought or at most a pretext, and not the real reason at all for the stopping and search of the vehicle. Again, assuming that this was the reason for the stopping, rather than the rather obvious desires of the police to engage in a speculative detention and search, then the officers should have limited themselves to the procedures specifically set out for traffic arrests, which do not permit of general search and seizure unless the arrestee refuses to sign the ticket, agreeing to appear in court.

The search of the vehicle and of its occupants and the interrogation of the occupants which led to alleged admissions and discovery of addiction, by prolonging a traffic arrest, would not be authorized. Clearly, a traffic officer has no right to make a general arrest and search or interrogation, when the stopping of the citizen is purportedly for a traffic violation. One case which throws some light on this subject is the following:

Since a postal inspector has no authority to make an arrest, he has no authority to make search or seizure. *U.S.* v. *Hellock*, 76 F. S. 985.

The Vehicle Code outlines the procedure to be followed in traffic arrests, and these procedures do not permit of a general arrest or search. The provision is to the effect that an arresting officer must prepare, in triplicate, an order to appear in court and he is limited to that. In the instant case, the officers went beyond the limitations imposed on them by the legislature.

That defendant was lawfully under arrest for a traffic violation did not make lawful a search and seizure, without

warrant, not based on probable cause. *Peo.* v. *Zeigler,* 100 N.W. 2d (Mich.) 456 (1960).

Proof of confession is never admissible unless shown to have been made voluntarily, and the burden of proof is on the People to show that it was. *Id.*

A lawful traffic arrest does not by itself authorize a contemporaneous search of the automobile as a matter of routine public policy. *Id.*

A search of a taxicab cannot be justified on the grounds that the cab driver might be arrested for double parking since the search would have no relation to the traffic violation or be a reasonable incident to an arrest therefor. *People* v. *Blodgett,* 46 Cal. 2d ——.

Next, in straining to justify the obviously wrongful arrest of defendant, the officers mentioned something about the reputation of the general neighborhood for purse snatching.

It developed on cross-examination however that the whole of the division in which the officers served (if not, indeed, the whole of the city) might be considered a high purse snatching, or high crime, area; so that the theory of the officers would permit the stopping, interrogation, and search of anybody that they chose anywhere in the City, certainly anywhere in the Wilshire District. Something more reasonable than the general stopping of citizens is obviously required by the *Cahan* Rule.

The doctrine that the constitution does not prohibit search and seizure as an incident of a lawful arrest may not be used as a pretext to search for evidence nor does it justify a general exploratory search of the premises and an unlawful arrest cannot justify a search and seizure as an incident thereof. 79 C.J.S., Searches and Seizures, Sec. 26, p. 796, nn. 20, 21, 22.

To be sure the authority to search for the fruits or the means of the offense as an incident to the lawful arrest, like all prerogatives based on reason, is susceptible to oppressive abuse. The authority must be confined to narrow limits and utmost good faith exacted. Courts must exercise care lest we unwittingly sanction an evidential exploration under the guise of a declared legitimate purpose. *Harris* v. *U.S.*, 151 F. 2d 837, 840.

The constitutional provisions prohibiting unreasonable searches and seizures apply to a search of the person. *Id.*, Sec. 11, p. 789, n. 85, citing:

The people's right, recognized by the Fourth Amendment, to be secure in their persons, house, papers, and effects against unreasonable searches and seizures was originally designed principally to protect a citizen in his home from arrest or seizure of his papers and goods therefrom but immunity from search and seizure without lawful warrant has been extented to unlawful seizure of persons not in their homes. *City of Price* v. *Jaynes,* 191 P. 2d 606, 113 Utah 89.

Persons lawfully within the United States are entitled to use public highways and have a right to free passage thereon without arrest without warrant. *Allen* v. *State,* 183 Wis. 323, 197 N.W. 808, 39 A.L.R. 782.

See also *Peo.* v. *Stein,* 265 Mich. 610, 251 N.W. 788, 92 A.L.R. 481, holding that even though one is violating the law in the presence of officers, they are not justified in arresting him without warrant where they were not aware of such violation until the search was made after his arrest.

See also *Hughes* v. *State,* 145 Tenn. 544, 238 S.W. 588, 20 A.L.R. 639, where the court stated that the *facts* constituting the offense must have been within the knowledge

of the officer and that knowledge must have been revealed in the officer's presence.

Probable cause for making an arrest without a warrant may not be inferred by the officer who made it from the fact that the person arrested did not protest his arrest, did not at once assert his innocence, and silently obeyed a command to proceed to the police station. 4 Am. Jur., Arrest, Sec. 48, p. 31, n. 14.5, citing *U.S.* v. *Dike*, 332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222.

The position of the trial court that the fact that co-arrestee Banks was shown to be a narcotics user would justify the search of the others in the car as well as of the vehicle does not seem to be supported by the cases:

Mere presence of defendant in another person's apartment would not justify his arrest and search, unless officers were justified in arresting such other person and reasonably mistook defendant for him. *Peo.* v. *Kitchens*, 294 P. 2d 17, 146 C. 2d 260.

It may be further observed that the alleged admissions of defendant-appellant related to past narcotic activity and not at all to any present involvement therein. Since he did not admit addiction but only "chippying" some time in the past, it may not be said that we have an admission even of a present status since "chippying" alone does not create the condition of addiction, but is by definition the absence thereof.

Persons lawfully within the United States are entitled to use the public highways and have a right to free passage thereon without interruption or search, unless a public officer authorized to search knows of probable cause for believing that the vehicle is carrying contraband or that its occupants have violated some law. 44 Cal. Jur. 2d,

Searches and Seizures, Sec. 25, p. 309, n. 15, citing *Wirin* v. *Horrall*, 85 C.A. 2d 497, 113 P. 2d 470.

When it appears that search and not the arrest is the real object of the officers in entering on the premises and the arrest is a pretext for, or at the most an incident of, the search, the search is not reasonable within the meaning of the Fourth Amendment. 79 C.J.S., Searches and Seizures, Sec. 67, p. 840, n. 73, citing *Henderson* v. *U.S.*, 12 F. 2d 528.

Where an officer, when making the arrest, did not know that the keg which defendant was carrying contained liquor and was not in possession of facts showing commission of misdemeanor, arrest was unlawful. 6 C.J.S., Arrest, Sec. 6, p. 598, n. 92, citing *Patton* v. *State*, 135 So. 352, 160 Miss. 274.

By the admissions contained in the People's own arrest report (Transcript, pages 24 and 25), it clearly appears that the arrest of the instant defendant, which began with an order that he get out of the vehicle, was solely in keeping with an exploratory search of his person, in that all the alleged evidence of narcotics use at all occurred after he was thus arrested, and placed under the jurisdiction of the police. The admissions upon which the police strongly rely in this case, occurred after the arrest and the search of the person of this appellant. The attitude of the police in their search is illuminated by testimony of the People's witness with respect to a similar search of the other arrestees at the scene (R. 22, ll. 21-26):

> "Q. Were you particularly looking for marks? A. I shined my light about his person. I look for anything. Not particularly marks, no.
>
> Q. For anything you might find? A. Yes.
>
> Q. And you happened to see the marks standing out there? A. That is correct."

Finally, under this head, we might point out that the defendant is a person aggrieved by the unlawful arrest of his co-arrestee, and could object to any evidence resulting therefrom which had adverse effect upon our instant defendant. This is the holding of a number of cases, notably *Peo.* v. *Colonna,* 140 C.A. 2d 705, wherein it was held that defendant could raise an objection although he was not an occupier. The same would obviously apply to invasion of the person as well as to a violation of the close.

Under the rule in *Mapp* v. *Ohio,* 367 U.S. 421, the right to a trial free of evidence unlawfully obtained has been declared federally protected. It would seem, therefore, that this Court is not bound to follow state decisions, which either deny the right to exclusion or which fall short of a minimum standard of the newly designated federal rights.

Under such minimal standard, we submit that the evidence—uncontradicted and viewed in the light most favorable to the appellee—shows a clear violation of the said rights of this appellant. We do not expect this Court to dissolve conflicts in evidence in this regard. We do urge that the uncontradicted portions of the evidence clearly support our position in this connection.

C. Procedural Due Process of Law Was Denied by a Conviction Totally Devoid of Evidentiary Support.

(1) *There Was No Evidence Whatsoever of Either Influence of a Narcotic or Addiction to a Narcotic.*

The rule which we here invoke has been stated by this Court in the case of *Thompson* v. *City of Louisville,* 362 U.S. 199. Here again, we do not rely upon the Court's determination of conflicts in evidence, but submit our case upon that view of the evidence most favorable to the appellee, under the usual approach in this regard.

Obviously, the presence of scar tissue of itself is no evidence whatsoever of present addiction. Without more, the most that it can be said to show is past addiction. The only satisfactory evidence of addiction would be something to show the compulsive use thereof, and the best available, if not only, evidence thereof would be the presence of withdrawal symptoms. Even Nalline, which may show present influence of the drug or its presence in the body, gives no indication of the fact of addiction. The fact that addiction itself is hard to prove should not permit us to let hard cases make bad law.

The only evidence, in fact, of scar tissue is on page 53 of the transcript, at which point the police officer not qualifying as an expert stated that he had seen "scar tissue and discoloration" on the inside of the right arm. The expert, on the other hand (page 58 and following), testified to individual scabs.

It is apparent from his testimony and from the photographs which required magnification before the jury could even be satisfied that there was any evidence at all, that only a few needle marks, widely scattered are involved in the instant case. This, then, is not the ordinary case wherein a confirmed addict is brought before the bar of justice. In fact, in summing up his impressions and opinions, the expert (R. 58, l. 25) stated simply that "a narcotic" was injected into the vein. This, then, was the People's case in chief, in a word. On cross-examination (R. 62), the following testimony was introduced:

> "Q. And at no time did you witness any withdrawal symptoms in Mr. Robinson? A. No, I did not.
>
> Q. As a matter of fact, he wasn't under the influence at the time you interviewed at all? A. No, he wasn't.
>
> Q. So you saw no influence and withdrawal? A. That is correct."

Furthermore, on page 84 of the Record, it appears that the People themselves contended only that they had proven use:

> "The Court: So that we may understand a little more clearly what Counsel has in mind, or perhaps the Court may have in mind, I understand, Mr. Gage, that you are not contending the defendant was under the influence of narcotics at the time of the arrest?
>
> Mr. Gage: No, I don't think we can establish that.
>
> The Court: I mention that because, apparently, Mr. McMorris has proceeded on some theory in that connection, and I do not intend to instruct the jury on it because I agree with Mr. Gage. The people have not made out a case, and I will instruct the jury by stating what the charge is; and failing to set forth that, therefore they will not gather that he is charged with that aspect of it. In other words, Mr. Gage, you are proceeding on the theory that he is addicted to the use of narcotics and that he unlawfully uses narcotics.
>
> Mr. Gage: Yes, sir. However, primarily, on the question of use itself."

The only evidence, other than that of the expert, offered by the People was in connection with probable cause for arrest, with the arresting officer attempting to show that he had a right to arrest appellant for a crime in his presence.

Under this head, may we make this observation: That the officer arrested this appellant because of marks that he found as a result of an unlawful search and arrest. Secondly, such marks, standing alone, could not prove the commission of a crime in the presence of an officer. This is true because such marks could indicate the use of a narcotic

in a jurisdiction beyond that of the officer's authority, and above all indicate a completed crime, not a crime in the presence of the officer. This, then, is a further reason why we urge that the arrest of the appellant was unlawful.

Since there were no withdrawal symptoms or indicia of influence of the drug, the only possible crime of which there was evidence was that of use somewhere at some time in the past, and in no event in the presence of the arresting officer.

(2) *The Only Conceivable Evidence of Venue Was by Admission of the Defendant and Not as a Part of the Corpus Delicti.*

The only evidence educed by the People in support of the requirement that venue be proven appears on page 60 of the Record. There, after the prosecuting witness stated that appellant admitted using heroin in a gas station at 54th and Central Avenue, upon a leading question by the prosecuting attorney, the witness added (as an afterthought?) that the location was "indicated" to be in Los Angeles. Aside from the fact that the word "indicated" would only imply a conclusion on the part of the testifying witness, we further submit that venue must be proven as a part of the corpus delicti and not by admission.

Sufficient proof of the venue is necessary in every criminal case. *People* v. *Pollock*, 26 Cal. App. 2d 602, 80 P. 2d 106.

It is an elementary principle of our jurisprudence that the question of jurisdiction over the subject matter can never be waived nor conferred by consent. It seems quite clear to us, that, from the standpoint of logic, the question of jurisdiction, whether it be local or general jurisdiction, is fundamentally and necessarily a question of fact, and

that in a criminal case, the burden of proving that fact rests on the prosecution. . . . Where this fact is not proved, the verdict is contrary to the evidence within subdivision 6 of section 1181 of the Penal Code and a new trial may be granted. *People* v. *Megladdery,* 40 Cal. App. 2d 748, 106 P. 2d 84.

In view of the cited legal principles, this Court may well hold in the language of *People* v. *Garcia,* 266 P. 2d 233, 234:

> "However, we are unable to find in the record any evidence of the venue of the offense. Viewing the evidence in the light most favorable to the judgment, it may be said to have been proved that the scars, scabs, and discolorations observed by the doctor and testified to by the defendant had been brought to the condition observed by the doctor within 12 to 24 hours of the arrest and physical examination, but there is no evidence whatever that this use of the narcotic occurred in San Diego County, state, or country."

(3) *There Was No Proof of the Use of an Illegal Narcotic.*

In the complaint, it was specifically alleged that appellant had used an illegal narcotic. As juries are constantly instructed, allegation in a complaint is not proof. Unless it be so, we have no proof of the use of heroin in this case, again except by admissions following objections that the corpus delicti had not been established. Clearly, the proof of the corpus delicti of the use of *heroin,* not just any narcotic, would have to be accomplished before admissions of the use of heroin could fill the void. In section 11,001 of the Health and Safety Code narcotics are defined. From the standpoint of clarity and the right to prior information as to the specific crime alleged, it is necessary to plead one

or more of the listed narcotics. In other words, we submit that to simply allege addiction to narcotics in the abstract would be insufficient under our rules of constitutional law and criminal pleading. Be that as it may, once alleged, it is the duty of the state to prove the specific allegation. The only testimony of the expert witness was that "some narcotic" had been injected into the vein of the appellant, as previously pointed out in this brief. We submit that such was insufficient to comply with the requirement that the proof meet the pleading, so there was a fatal variance, or a fatal defect or lack of proof, as to an essential allegation.

Even if the jury chose not to believe the uncontradicted explanation by defendant and his mother of the presence throughout his body of certain marks, a holdover from his military service, although such marks were in fact general and not just in the crook of his arm, there is no evidence whatsoever that the marks were made by a specific narcotic.

Summary and Conclusion

Nowhere have we found much of what we have here contended for better summarized than in the words of *Maurer* and *Vogel, supra*:

> "During the last quarter of the 19th century and the first quarter of the 20th century, there was much controversy over whether drug addiction was a *disease or a vice,* and inhumane treatment often given addicts —extending even into the present time—reflects the attitude of the public and law enforcement officers that narcotic addiction is a vice from which the addict can be broken if he is treated severely enough. However, by about 1925 the medical profession, as a result of much discussion in the medical journals and in the

medical societies, generally accepted the theory that a drug addict is a sick person, and that addiction per se does not mean that the individual is necessarily either vicious or criminal.

"However, the federal law at present, for all practical purposes, makes it a crime to be a narcotic addict, and some of the rather severe state laws being sponsored currently seem to ignore more enlightened medical opinion and revert to the punitive action as the sole treatment for addiction—confinement to jail or prison. Many private physicians and medical organizations have taken little active interest in the present near-hysteria over drug addiction, despite the fact that most medical men recognize that a drug addict is usually *sick first* and possibly a criminal second, and that he should receive medical treatment the same as a victim of syphilis who *may have violated the law* in acquiring the *disease*.

"Most courts feel that society can go only so far in trying to outlaw either habit-forming laxatives or phony dentifrices, even to protect the uninformed individual. The answers to these problems are educational rather than legal." *Id.*, p. 25.

We submit that the criminal prosecution of the mental and physical illness that is addiction transcends considerations of right or wrong legislative policy, and is governed by the constitutional provisions requiring reasonable classification and reasonable relationship between object and means, and those forbidding cruel and unusual punishment and interference with the privilege and immunity of free ingress and egress among the several states.

Finally, we submit that the inherent violence and horror in the untreated withdrawal of narcotics, necessarily a

part of our present punitive approach, is such a complete absence of humanity and of medical and psychiatric knowledge of modern civilization as to offend a sense of justice (*Rochin* v. *California*, 342 U.S. 165), and that therefore the punitive approach is beyond the limited powers of the legislature.

May we conclude with this language from the editorial section of the Prison Journal published in April, 1936, in connection with the Criminal Registration Law:

> "We are utterly opposed to the . . . law in principle because we believe, with some competent authorities, that it is unconstitutional. A more important objecjection, perhaps, than this, is the psychic effect which it has on every man who has committed a crime. It opens up old sores. It reaffirms the conviction which exists in the minds of too many of these people that the police are anxious to get something on them. . . .
>
> "We are prone to forget that voluntary association and cooperation are fundamental principles of democracy. Any departure from these principles in lawmaking invites resistance, and strikes at the roots of democracy."

Wherefore, we respectfully submit that the state legislation herein involved should be held unconstitutional, and that the conviction of appellant should be reversed.

Respectfully submitted,

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APPENDIX

Penal Code of the State of California, Section 647:

1. Every person (except a California Indian) without visible means of living who has the physical ability to work, and who does not seek employment, nor labor when employment is offered to him; or,

2. Every beggar who solicits alms as a business, or

3. Every person who roams about from place to place without any lawful business; or,

4. Every person known to be a pickpocket, thief, burglar, or confidence operator, either by his own confession, or by his having been convicted of any of such offenses, and having no visible or lawful means of support, when found loitering around any steamboat landing, railroad depot, banking institution, broker's office, place of amusement, auction room, store, shop or crowded thoroughfare, car, or omnibus, or any public gathering or assembly; or

5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or,

6. Every person who wanders about the streets at late or unusual hours of the night, without any visible or lawful business; or

7. Every person who lodges in any barn, shed, shop, outhouse, vessel, or place other than such as is kept for lodging purposes, without the permission of the owner or party entitled to the possession thereof; or,

8. Every person who lives in and about houses of ill-fame; or,

9. Every person who acts as a runner or capper for attorneys in and about police courts or city prisons; or

10. Every common prostitute; or

11. Every common drunkard; or,

12. Every person who is a drug addict; provided, that a drug addict within the meaning of this section, is any person who habitually takes or otherwise uses narcotics, except that when such user of narcotics is suffering from an incurable disease or an accident or injury and to whom such narcotics are furnished, prescribed or administered in good faith and in the course of his professional practice by a physician duly licensed in this state and who is in attendance upon such user of narcotics, such person shall not be held to be a drug addict within the meaning of this section (1931 Amendment).

Amended by Stats. 1939, ch. 1078, Sec. 1, p. 3002, omitting subd. 12 (Deerings California Codes, Annotated, 1961, Legislative History to Sec. 647).

Now Sec. 647 provides that any person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(a) Soliciting or engaging in lewd or dissolute conduct in any public place or in any place open to public view;

(b) Soliciting or engaging in acts of prostitution;

(c) Begging alms;

(d) Loitering about any toilet open to the public to engage in or solicit lewd or unlawful acts;

(e) Loitering or wandering on the streets without apparent reason and refusing to give proper identification when requested by any peace officer, if the circumstances would indicate to a reasonable man that the public safety demands such identification;

(f) Being in a public place under the influence of intoxicating liquor, or drugs, in such a condition that he cannot care for his own safety or that of others, or because of his condition he interferes with the free use of any street, sidewalk or pubic way;

(g) Loitering or prowling on the property of another in the nighttime without visible or lawful business with

the owner or occupant, or while doing such an act, peeking in the door or window of any inhabited building or structure thereon;

(h) Lodging in any building or place, whether public or private, without permission.

New Sec. 647 in contrast to its predecessor penalizes *acts* and not *status* or *condition*. This change would seem to eliminate the constitutional problems (Journal of the State Bar of California, vol. 36, p. 802).